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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:19-cv-00892-HSG

**DEFENDANTS' NOTICE OF
MOTION AND MOTION FOR
PARTIAL SUMMARY
JUDGMENT; MEMORANDUM
AND POINTS OF AUTHORITIES
IN SUPPORT THEREOF AND IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Hearing Date: None set per Court order

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1 **NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT**

2 PLEASE TAKE NOTICE that Defendants hereby move the Court pursuant to Federal Rules
3 of Civil Procedure 54(b) and 56 for partial summary judgment with respect to the funding and
4 construction of the border barrier projects identified as El Paso Sector Project 1, Yuma Sector Project
5 1, El Centro Sector Project 1, and Tucson Sector Projects 1, 2, and 3. The motion is based on the
6 following Memorandum of Points and Authorities in support of Defendants' motion and in
7 opposition to Plaintiffs' motion for partial summary judgment, as well as all previous filings in this
8 action, including the certified administrative record (ECF No. 163), Defendants' opposition to
9 Plaintiffs' motion for a preliminary injunction (ECF No. 64), and Defendants' motion for a stay
10 pending appeal (ECF No. 146).

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 At the southern border, enormous quantities of illegal drugs are flowing into our Nation. In
13 response to this crisis, and pursuant to longstanding statutory authority (10 U.S.C. § 284), the
14 Department of Homeland Security (DHS) asked the Department of Defense (DoD) to support its
15 counternarcotics operations by building barriers and roads and installing lighting in two high priority
16 drug-smuggling corridors between ports of entry. The Court should not permanently enjoin DoD
17 from providing DHS that critical support.

18 Partial summary judgment should be granted in favor of Defendants because DoD lawfully
19 transferred funds across internal budget accounts to fund the requested barrier projects in accordance
20 with the requirements of § 8005 of the DoD Appropriations Act for Fiscal Year 2019, Pub. L. No.
21 115-245. Section 8005 governs DoD's internal budget and regulates the agency's relationship with
22 Congress; it does not provide a cause of action for private enforcement. Even assuming there is an
23 implied cause of action in equity for private enforcement of this internal transfer provision of the
24 Defense budget, the aesthetic and recreational interests Plaintiffs allege fall well outside any zone of
25 interests conceivably protected by § 8005. And even if the Court reaches the merits, § 8005's
26 requirements are satisfied here.

27 Plaintiffs also fall outside the zone of interests protected by § 284, which authorizes DoD to
28 provide support to civilian law enforcement agencies through "construction of roads and fences and

1 installation of lighting to block drug smuggling corridors across international boundaries of the United
 2 States.” Even if Plaintiffs could raise a challenge on the merits, the elements of § 284 are plainly
 3 satisfied here because the border barrier projects DoD plans to undertake at DHS’s request are located
 4 in drug-smuggling corridors.

5 Plaintiffs’ remaining claims similarly lack merit. The National Environmental Policy Act
 6 (NEPA) claims fail because the Acting Secretary of Homeland Security has exercised his statutory
 7 authority to waive NEPA. Additionally, Plaintiffs’ constitutional claims fail because they contravene
 8 the principle that “claims simply alleging that the President has exceeded his statutory authority are
 9 not ‘constitutional’ claims.” *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

10 Finally, the Court should deny Plaintiffs’ request for a permanent injunction. Plaintiffs’ alleged
 11 aesthetic and recreational interests do not come close to outweighing the harm from interfering with
 12 efforts to stop the flow of drugs entering the country. Moreover, the Executive Branch would face
 13 significant irreparable harm from the entry of a permanent injunction because it would prevent DoD
 14 from obligating toward the projects millions of dollars that will permanently lapse at the end of the
 15 fiscal year, as well as impose significant unrecoverable expenses for stopping work on the projects.

16 For these reasons, as further explained below, the Court should deny Plaintiffs’ motion, grant
 17 Defendants’ motion, and enter final judgment for Defendants on all claims related to the funding and
 18 construction of El Centro Sector Project 1, El Paso Sector Project 1, Yuma Sector Project 1, and
 19 Tucson Sector Projects 1, 2, and 3.

20 **BACKGROUND**

21 **I. Congress’s Express Authorization of Border Barrier Construction**

22 The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorizes the
 23 Secretary of Homeland Security to “take such actions as may be necessary to install additional physical
 24 barriers and roads . . . in the vicinity of the United States border to deter illegal crossings in areas of
 25 high illegal entry into the United States.” Pub. L. No. 104-208, Div. C., Title I § 102(a), 110 Stat. 3009
 26 (1996) (codified at 8 U.S.C. § 1103 note). In 2005, Congress grew frustrated by “[c]ontinued delays
 27 caused by litigation” preventing border barrier construction and amended IIRIRA by granting the
 28 Secretary of Homeland Security authority to “to waive all legal requirements such Secretary, in such

Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section." *See* H.R. Rep. 109-72, at 171 (May 3, 2005); Pub. L. No. 109-13, Div. B, Title I § 102, 119 Stat. 231, 302, 306 (IIRIRA § 102(c)). Congress amended IIRIRA again in 2006, requiring construction of "physical barriers, roads, lights, cameras, and sensors" across hundreds of miles of the southern border in five specified locations. Pub. L. No. 109-367, § 3, 120 Stat. 2638. In 2007, Congress expanded this requirement to require "construct[ion of] reinforced fencing along not less than 700 miles of the southwest border." Pub. L. No. 110-161, Div. E, Title V § 564, 121 Stat. 1844 (2007) (IIRIRA § 102(b)). Relying on these authorities, DHS has installed approximately 650 miles of barriers along the southern border. *See* Senate Hearing on the DHS FY 2018 Budget, 2017 WL 2311065 (May 25, 2017) (Testimony of then-Secretary of Homeland Security John Kelly).

II. Congress's Authorization for DoD Support of DHS's Border Security Efforts

Congress also has expressly authorized DoD to provide a wide range of support to DHS at the southern border. 10 U.S.C. § 284; *see id.* §§ 271-74. Since the early 1990s, military personnel have supported civilian law-enforcement agency activities to secure the border, counter the spread of illegal drugs, and respond to transnational threats. *See* H. Armed Servs. Comm. Hr'g on S. Border Defense Support (Jan. 29, 2019) (Joint Statement of John Rood and Vice Admiral Michael Gilday) (Ex. 1). For decades, U.S. military forces have played an active role in barrier construction and reinforcement on the southern border. Military personnel were critical to construction of the first modern border barrier near San Diego, CA in the early 1990s, as well as other border fence projects. *See* H.R. Rep. No. 103-200, at 330-31, 1993 WL 298896 (1993) (commending DoD for its role in construction of the San Diego primary fence); Hr'g Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Test. of Barry R. McCaffrey) (military personnel constructed over 65 miles of barrier fencing). In 2006, the National Guard improved southern border security infrastructure by building more than 38 miles of fence, 96 miles of vehicle barrier, and more than 19 miles of new all-weather road, and performing road repairs exceeding 700 miles. *See* Joint Statement of Rood and Gilday. More recently, the U.S. Army Corps of Engineers has assisted DHS by providing planning, engineering, and barrier construction support. *See, e.g., Gringo Pass, Inc. v. Kiewit S.W. Co.*, 2012 WL 12905166, at *1 (D. Ariz. Jan. 11, 2012).

1 **III. DoD's Current Support for DHS's Efforts to Secure the Southern Border**

2 On January 25, 2017, the President issued an Executive Order directing federal agencies “to
3 deploy all lawful means to secure the Nation’s southern border.” Border Security and Immigration
4 Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017). To “prevent
5 illegal immigration, drug and human trafficking, and acts of terrorism,” *id.*, the Order required agencies
6 to “take all appropriate steps to immediately plan, design and construct a physical wall along the
7 southern border,” including to “[i]dentify and, to the extent permitted by law, allocate all sources of
8 Federal funds” to that effort. *Id.* at 8794.

9 On April 4, 2018, the President issued a memorandum to the Secretary of Defense, Secretary
10 of Homeland Security, and the Attorney General titled, “Securing the Southern Border of the United
11 States.” Presidential Memorandum, 2018 WL 1633761 (Apr. 4, 2018). The President stated “[t]he
12 security of the United States is imperiled by a drastic surge of illegal activity on the southern border”
13 and pointed to “the combination of illegal drugs, dangerous gang activity, and extensive illegal
14 immigration.” *Id.* at 1. The President determined the situation at the border had “reached a point of
15 crisis” that “once again calls for the National Guard to help secure our border and protect our
16 homeland.” *Id.* To address this crisis, the President directed DoD to support DHS in “securing the
17 southern border and taking other necessary actions to stop the flow of deadly drugs and other
18 contraband, gang members and other criminals, and illegal aliens into this country.” *Id.* at 2. Over
19 the course of the last year, military personnel, both active duty and National Guard, have provided a
20 wide range of border security support to DHS, including hardening U.S. ports of entry, erecting
21 temporary barriers, and emplacing concertina wire. *See* Joint Statement of Rood and Gilday.

22 **IV. The President's Proclamation Declaring a National Emergency at the** 23 **Southern Border**

24 On February 15, 2019, the President issued a proclamation declaring that “a national
25 emergency exists at the southern border of the United States.” *See* Declaring a Nat’l Emergency
26 Concerning the S. Border of the United States, Pres. Proc. No. 9844, 84 Fed. Reg. 4949 (Feb. 15,
27 2019) (Proclamation). The President determined that “[t]he current situation at the southern border
28 presents a border security and humanitarian crisis that threatens core national security interests and

1 constitutes a national emergency.” *Id.* The President explained:

2 The southern border is a major entry point for criminals, gang members, and illicit
3 narcotics. The problem of large-scale unlawful migration through the southern border
4 is long-standing, and despite the executive branch’s exercise of existing statutory
5 authorities, the situation has worsened in certain respects in recent years.

6 *Id.* “Because of the gravity of the current emergency situation,” the President determined that “this
7 emergency requires use of the Armed Forces” and “it is necessary for the Armed Forces to provide
8 additional support to address the crisis.” *Id.*

9 On March 15, 2019, the President vetoed a joint resolution passed by Congress that would
10 have terminated the President’s national emergency declaration. *See* Veto Message for H.J. Res. 46,
11 2019 WL 1219481 (Mar. 15, 2019). The President relied upon statistics published by U.S. Customs
12 and Border Protection (CBP) as well as congressional testimony by the Secretary of Homeland
13 Security to reaffirm that a national emergency exists along the southern border. *See id.* The President
14 highlighted (1) the recent increase in the number of apprehensions along the southern border; (2)
15 CBP’s seizure of more than 820,000 pounds of drugs in 2018; and (3) arrests of 266,000 aliens in 2017
16 and 2018 previously charged with or convicted of crimes. *See id.* The President also emphasized that
17 migration trends along the southern border have changed to caravans that include record numbers of
18 families and unaccompanied children, which requires frontline border enforcement personnel to
19 divert resources away from border security to humanitarian efforts and medical care. *See id.* Further,
20 the President stated that criminal organizations are taking advantage of the large flows of families and
21 unaccompanied minors to conduct a range of illegal activity. *See id.* The President stated that border
22 enforcement personnel and resources are strained “to the breaking point” and concluded that the
23 “situation on our border cannot be described as anything other than a national emergency, and our
24 Armed Forces are needed to help confront it.” *See id.*

25 The situation at the southern border “is growing worse by the day” and DHS is facing “a
26 system-wide meltdown.” *See* Testimony of Kevin McAleenan, Acting Secretary of Homeland Security,
27 Before the U.S. Senate Committee on the Judiciary (June 11, 2019) (Ex. 2); Letter from Secretary of
28 Homeland Security Kirstjen M. Nielsen to the United States Senate and House of Representatives
 (Mar. 28, 2019) (Ex. 3). “DHS facilities are overflowing, agents and officers are stretched too thin,

1 and the magnitude of arriving and detained aliens has increased the risk of life threatening incidents.”
 2 *See* Nielsen Letter. In May 2019 alone, over 132,887 people were apprehended between ports of entry
 3 on the southern border, compared with 99,304 in April and 92,840 in March. *See* DHS Sw. Border
 4 Migration Statistics FY 2019, at 2 (dated June 5, 2019) (Ex. 4).¹

5 **V. The Use of Spending Authorities for Barrier Construction**

6 On the same day the President issued the Proclamation, the White House announced the
 7 sources of funding to be used to construct additional barriers along the southern border. In addition
 8 to the \$1.375 billion appropriation to DHS as part of the Consolidated Appropriations Act for Fiscal
 9 Year 2019 (CAA), *see* Pub. L. No. 116-6, § 230, 133 Stat. 13 (2019), the fact sheet identifies three
 10 additional sources of funding: (1) About \$601 million from the Treasury Forfeiture Fund; (2) Up to
 11 \$2.5 billion of DoD funds transferred for Support for Counterdrug Activities (10 U.S.C. § 284); and
 12 (3) Up to \$3.6 billion reallocated from Department of Defense military construction projects pursuant
 13 10 U.S.C. § 2808. *See* President Donald J. Trump’s Border Security Victory (Feb. 15, 2019) (Ex. 5).
 14 The parties’ respective motions for partial summary judgment address only the funding and
 15 construction of border barriers pursuant to § 284.

16 **A. 10 U.S.C. § 284**

17 10 U.S.C. § 284 authorizes DoD to provide “support for the counterdrug activities . . . of any
 18 other department or agency of the Federal Government,” including for “[c]onstruction of roads and
 19 fences and installation of lighting to block drug smuggling corridors across international boundaries
 20 of the United States.” *Id.* § 284(a); (b)(7). Congress first provided DoD this authority in the National
 21 Defense Authorization Act for Fiscal Year 1991. Pub. L. No. 101-510, § 1004, 104 Stat. 1485 (1990).
 22 Congress regularly renewed § 1004 and praised DoD’s involvement in building barrier fences along
 23 the southern border. For example, in 1993, Congress “commend[ed]” DoD’s efforts to reinforce the
 24 border fence along a 14-mile drug smuggling corridor in “the San Diego-Tijuana border area” H.R.

26 ¹ The Court may take judicial notice of the official U.S. Government documents and the
 27 publicly available information on Government websites cited herein and attached. *See Kater v. Churchill*
 28 *Downs Inc.*, 886 F.3d 784, 788 n.2 (9th Cir. 2018); *People With Disabilities Found. v. Colvin*, Case No. 15-
 CV-02570-HSG, 2016 WL 2984898, at *3 (N.D. Cal. May 24, 2016).

Rep. No. 103-200, at 330-31, 1993 WL 298896 (1993). Executive Branch officials and Congress have also noted the importance of DoD's involvement in border security projects to prevent drug smuggling. *See* Hr'g Before the S. Comm. on Armed Servs. Subcomm. on Emerging Threats and Capabilities, 1999 WL 258030 (Apr. 27, 1999) (Testimony of Barry R. McCaffrey) (testifying about the "vital contributions" made by DoD to construct 65 miles of barrier fencings, 111 miles of roads, and 17 miles of lighting); H.R. Rep. No. 110-652, 420 (2008) (describing border fencing as an "invaluable counter-narcotics resource" and recommending a \$5 million increase to DoD's budget to continue construction). In light of the threat posed by illegal drug trafficking, Congress permanently codified § 1004 at 10 U.S.C. § 284 in 2016, directing DoD "to ensure appropriate resources are allocated to efforts to combat this threat." H.R. Rep. No. 114-840, 1147 (2016).

In accordance with § 284, on February 25, 2019, DHS requested DoD's assistance in blocking 11 specific drug-smuggling corridors on federal land along certain portions of the southern border. *See* Administrative Record (AR) at 15-24 (ECF No. 163). The request sought the replacement of existing vehicle barricades or dilapidated pedestrian fencing with new pedestrian fencing, the construction of new and improvement of existing patrol roads, and the installation of lighting. *Id.*

As relevant to this case, the Acting Secretary of Defense approved construction and funding of six border barrier projects. *See* AR at 1-8; 137-144.² El Paso Sector Project 1 will replace existing vehicle barriers with 30-foot high pedestrian fencing along approximately 46 miles of federal land in Luna and Doña Ana Counties, New Mexico. *See* AR at 22-23, 55-60; First Declaration of Paul Enriquez (April 25, 2019) ¶¶ 16-18 (Ex. 6). Yuma Sector Project 1 will replace approximately 5 miles of existing vehicle barriers with 30-foot high pedestrian fencing on federal land in Yuma County, Arizona. *See* AR at 18-19, 55-60; First Enriquez Declaration ¶¶ 10-12. El Centro Sector Project 1 involves replacing approximately 15 miles of existing vehicle barriers with new pedestrian fencing in Imperial County, California. *See* AR at 17, 138; Second Declaration of Paul Enriquez (June 19, 2019) ¶¶ 11-13 (Ex. 7). Tucson Projects 1, 2, and 3 collectively will replace approximately 63 miles of existing

² The Acting Secretary approved a seventh project (Yuma Sector Project 2), but the Army Corps of Engineers subsequently decided not to fund or construct that project pursuant to § 8005 and § 284. *See* Second Declaration of Kenneth Rapuano ¶ 4 (ECF No. 118).

1 vehicle barrier and outmoded pedestrian barrier in Pima and Cochise Counties, Arizona. *See* AR at
 2 138; Second Enriquez Decl. ¶¶ 14-16.

3 In approving these projects, the Acting Secretary of Defense noted that that DHS identified
 4 each project location as a drug-smuggling corridor, thereby satisfying the statutory requirement of
 5 § 284(b)(7). *See* AR at 7, 143. The United States Border Patrol collectively had more than 4,000
 6 separate drug-related events between border crossings in the El Paso, El Centro, Tucson, and Yuma
 7 Sectors in fiscal year 2018, through which it seized over 155,000 pounds of marijuana, over 640 pounds
 8 of cocaine, over 285 pounds of heroin, over 4,300 pounds of methamphetamine, and over 17 pounds
 9 of fentanyl. *See id.* at 17-22; Second Declaration of Millard LeMaster ¶¶ 6 (June 19, 2019) (Ex. 8).³
 10 These high rates of drug smuggling have continued into fiscal year 2019. *See* First Declaration of
 11 Millard LeMaster ¶¶ 4-5 (May 28, 2019) (Ex. 9); Second LeMaster Decl. ¶¶ 7-8. The existing vehicle
 12 barriers in these areas must be replaced because they no longer effectively stop transnational criminal
 13 organizations from smuggling illegal drugs into United States. *See* AR at 17-22.

14 To fund the El Paso and Yuma projects, the Acting Secretary of Defense authorized the
 15 transfer of \$1 billion to the Drug Interdiction and Counter-Drug Activities, Defense, appropriation,
 16 from Army personnel funds that had been identified as excess to current requirements. *See* AR at 2,
 17 5, 10-11, 35-37. The Acting Secretary directed the transfer of funds pursuant to DoD's general
 18 transfer authority under § 8005 of the DoD Appropriations Act for Fiscal Year 2019, Pub. L. 115-
 19 245, div. A, 132 Stat. 2981, 2999 (Sept. 28, 2018), and § 1001 of the John S. McCain National Defense
 20 Authorization Act for Fiscal Year 2019 (NDAA), Pub. L. 115-232, § 1001, 132 Stat. 1636, 1945 (Aug.
 21 13, 2018). *See id.*

22 Section 8005 authorizes the Secretary of Defense to transfer up to \$4 billion of certain DoD
 23 funds between appropriations provided “[t]hat the authority to transfer may not be used unless for
 24 higher priority items, based on unforeseen military requirements than those for which originally
 25

26 ³ In preparation of this filing, Defendants discovered that the February 2019 request for
 27 support from DHS to DoD (*See* AR at 19) understated the amount of marijuana, cocaine, and
 28 heroin seized in the Tucson Sector in fiscal year 2018. This declaration corrects and updates those
 statistics. *See* Second LeMaster Decl. ¶ 6.

1 appropriated and in no case where the item for which funds are requested has been denied by the
 2 Congress.” Pub. L. No. 115-245, § 8005. Section 1001 of the NDAA provides the Secretary of
 3 Defense with similar transfer authority and incorporates the same substantive elements as § 8005. *See*
 4 Pub. L. 115-232, § 1001. The Acting Secretary concluded the transfer of funds met the requirements
 5 of these statutes. *See* AR at 5, 10-11.

6 To fund the El Centro and Tucson projects, the Acting Secretary of Defense authorized a
 7 transfer of \$1.5 billion pursuant to § 8005 and § 1001, as well as DoD’s special transfer authority under
 8 § 9002 of the DoD Appropriations Act and § 1512 of the NDAA. *See* AR at 137-141, 146-56. Section
 9 9002 authorizes the Secretary of Defense to transfer up to \$2 billion “between the appropriations or
 10 funds made available to the Department of Defense in [Title IX]” of the DoD Appropriations Act
 11 “subject to the same terms and conditions as the authority provided in section 8005 of this Act.” *See*
 12 Pub. L. No. 115-245, § 8005. Section 1512 of the NDAA authorizes special transfer authority similar
 13 to § 9002 and also requires compliance with same requirements as § 8005. *See* Pub. L. 115-232, § 1512.

14 On April 24 and May 15, 2019, the Acting Secretary of Homeland Security exercised his
 15 authority under § 102(c)(1) of IIRIRA to waive the application of various laws to ensure expeditious
 16 construction of the projects. *See* Determinations Pursuant to Section 102 of the IIRIRA, as Amended,
 17 84 Fed. Reg. 17185-87 (Apr. 24, 2019); 21798-801 (May 15, 2019). The waived laws include NEPA
 18 (42 U.S.C. 4321 *et seq.*) along with “all federal, state, or other laws, regulations, and legal requirements
 19 of, deriving from, or related to the subject of, the [listed] statutes.” *Id.*

20 **STANDARD OF REVIEW**

21 Summary judgment is appropriate when, viewing the evidence and drawing all reasonable
 22 inferences most favorably to the nonmoving party, “there is no genuine dispute as to any material fact
 23 and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*,
 24 477 U.S. 317, 321 (1986). Here, where the parties have filed cross-motions for partial summary
 25 judgment, “the court may direct entry of a final judgment as to one or more, but fewer than all, claims
 26 or parties only if the court expressly determines that there is no just reason for delay.” *See* Fed. R. Civ.
 27 P. 54(b).

ARGUMENT

I. DoD's Transfer of Funds Pursuant to § 8005 is Lawful.

With respect to the transfer of funds pursuant to the requirements set forth in § 8005, Defendants acknowledge that the Court previously rejected Defendants' arguments about the proper interpretation of § 8005 in its opinion granting in part and denying in part Plaintiffs' motion for preliminary injunction. *See* ECF No. 144 at 27-42. Defendants' respectfully submit that the Court erred for two reasons.⁴

First, Plaintiffs fall outside the zone of interests of § 8005 and thus cannot sue to enforce it. The zone-of-interests requirement is a general presumption about Congress's intended limits on the scope of *all* causes of action, not just express causes of action under the APA or other statutes. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (the zone-of-interests test "is a requirement of general application"). The Court incorrectly concluded that the zone-of-interests requirement did not apply to the Plaintiffs because they sought equitable relief against Defendants for exceeding statutory authority. *See* PI Order at 29-30. *Lexmark's* reference to the requirement applying to all "statutory" or "statutorily created" causes of action, *see id.*, encompasses equitable causes of action, which are inferred from Congress's statutory grant of equity jurisdiction and which enforce statutes enacted against the backdrop of the zone-of-interests limitation, *see Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384-85 (2015); *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999). It turns the separation of powers on its head to hold that the zone-of-interests requirement applies where Congress has provided a statutory cause of action, but that, where Congress has not expressly authorized suit *at all*, any injured persons can sue, even if their interests are entirely unrelated to the interests protected by the statute. There is no basis to conclude that Congress intended to allow individuals outside the zone of interests of a particular statute nonetheless to enforce that statute in equity.

⁴ Because § 1001, § 1512, and § 9002 incorporate § 8005 by reference or are subject to the same substantive requirements as § 8005, *see* PI Order 12 n.7, this motion refers to these requirements collectively by reference to § 8005.

Even if there were an implied cause of action in equity for private enforcement of § 8005,⁵ Plaintiffs' fall outside of any interest conceivably protected by § 8005 because the statute exists to govern the relationship between Congress and DoD with respect to military spending. *See Lexmark*, 572 U.S. at 129-32. Plaintiffs' recreational or aesthetic harms from a project paid for with transferred funds are "so marginally related" to § 8005's interests that the statute does not even "arguably" authorize enforcement suits by such persons under the APA or otherwise. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012). Private parties alleging aesthetic or recreational harms from DoD's intended uses for its internally transferred funds are not "reasonable" or "predictable" challengers under § 8005. *Id.* at 227-28. To the contrary, private enforcement of § 8005 is unprecedented, and Plaintiffs cite no authority in which private parties have ever brought suit to challenge any similar internal transfer of agency funds.

Second, DoD has satisfied the requirements set forth in § 8005. The Court previously concluded that DoD had not satisfied two of § 8005's elements, holding that DoD had transferred funds for an "item" that was previously "denied" by Congress and that supported a military requirement that was not "unforeseen." *See* PI Order at 31-36. The Court's rationale was that, at the time of DoD's appropriation, the Executive Branch's general desire for border-wall funding was foreseen and Congress provided DHS only a limited amount of funding. *See id.* But that reasoning considers the appropriations process at far too high a level of generality and misunderstands both the statutory language and budget process. Section 8005 is a provision in the *DoD* appropriations statute, which grants DoD limited authorization to make internal transfers to fund *particular items* after DoD's annual appropriations statute is enacted. Under § 8005, an "item for which funds are requested" is a particular budget item requiring additional funding beyond the amount in the DoD appropriation for the fiscal year. At no point in the budgeting process, however, did Congress deny DoD funding for construction of the six projects at issue here under its counter-narcotics support appropriation.

⁵ Because Congress did not create a private right of action to enforce § 8005 or the statutes that form the basis of Plaintiffs' motion, their claims should be governed by the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*, as challenges to agency action. *See City of Sausalito v. O'Neil*, 386 F.3d 1186, 1205 (9th Cir. 2004) (citing cases); Defs.' Opp'n to Pls' Mot. for Prelim. Inj. at 12-13. *But see* PI Order at 10-11.

1 Consequently, Plaintiffs' reliance on Executive Branch funding requests for the border wall generally,
 2 Pls.' Mot. at 10-11, are irrelevant to the meaning of § 8005.

3 Similarly, the "item" at issue here—DoD's support for the projects requested by DHS under
 4 § 284—was "unforeseen." An expenditure is "unforeseen" under § 8005 if DoD was not aware of
 5 the specific need when it made its budgeting requests and Congress finalized the DoD appropriation.
 6 Congress enacted DoD's fiscal year 2019 appropriation on September 28, 2018. *See* Pub. L. No. 115-
 7 245, 132 Stat. 2981. DHS did not request DoD's assistance in blocking specific drug-smuggling
 8 corridors until February 25, 2019, five months later. *See* AR at 15-24. Therefore, the need for DoD
 9 to provide support to DHS for projects at issue here was not known at the time of DoD's budget
 10 request in 2018. *See* AR 10-11, 146-47. Further, DoD may undertake counter-drug support pursuant
 11 to § 284 only upon receiving a request by another agency, *see* 10 U.S.C. § 284(a), thus there is no merit
 12 to the argument that the funding requests at issue were "foreseen" simply that there was an ongoing
 13 legislative debate over DHS's separate request for appropriations for border barriers.

14 Section 284 support is also undoubtedly a "military requirement" under § 8005. Congress
 15 enacted § 284 precisely because it recognized the need for DoD to support civilian agencies by
 16 bringing military resources, both skills and funding, to bear upon the problem of drug smuggling. *See*
 17 H.R. Rep. 114-840, 1147 (Nov. 30, 2016). Concluding that DoD's support for counter-drug activities
 18 is not a "military requirement" requires overriding Congress's assignment of that function to the
 19 military in § 284. Moreover, Plaintiffs' proposed interpretation of a "military requirement" is
 20 inconsistent with the way Congress and DoD have understood the provision for many years. *See*
 21 Reprogramming Application & Congressional Approvals, Sept. 2007 (Ex. 10) (§ 8005 transfer to the
 22 counter-drug account for an infrastructure project in Nicaragua to prevent smuggling of cocaine into
 23 the United States); Reprogramming Application & Congressional Approvals, Sept. 2006 (Ex. 11)
 24 (§ 8005 transfer to support DoD's involvement in CBP's border security mission). Accordingly, there
 25 is no historical or legal basis for the Court to adopt Plaintiffs' narrow construction that § 8005 transfers
 26 should be limited solely for activities that suppress "military threats" for which only DoD has exclusive
 27 authority to address. *See* Plaintiffs' Motion for Partial Summary Judgment at 12 (ECF No. 168) (Pls.'
 28 SJ Mot.).

1 There is also no constitutional issue presented by Defendants' interpretation of § 8005.
 2 Congress has long provided agencies with "lump-sum appropriation[s]," and agencies' delegated
 3 authority over "[t]he allocation of funds" is not only constitutional, but "committed to agency
 4 discretion by law" and "accordingly unreviewable." *Lincoln v. Vigil*, 508 U.S. 182, 192-93 (1993). Given
 5 that Congress thus could have granted DoD unfettered discretion over its total budget, § 8005's
 6 limited grant of transfer authority poses no constitutional concerns, however broadly construed.

7 **II. DoD's Use of Counterdrug Support Authority Under § 284 Is Lawful.**

8 DoD is lawfully providing counterdrug support to DHS pursuant to its authority under § 284
 9 to construct barrier projects in drug-smuggling corridors along the southern border. Accordingly, the
 10 Court should enter partial summary judgment in Defendants' favor on Plaintiffs' § 284 claims.

11 As a threshold matter, Plaintiffs cannot sue to enforce § 284 because Plaintiffs are not within
 12 the zone of interests of the statute. *See Lexmark*, 572 U.S. at 129. Section 284's limitations on when
 13 DoD can provide counter-drug support are designed to regulate the relationship between Congress,
 14 DoD, and state or federal agencies seeking assistance, based on budgetary control and agency focus.
 15 The "interests protected by the" statute are completely unrelated to the aesthetic and recreational
 16 interests Plaintiffs seek to vindicate in this case. *See id.* at 131. Nothing in the statute suggests that
 17 Congress intended to give private parties a remedy for protecting against the alleged negative
 18 externalities of barrier construction; and as such, neither the APA nor an implied cause of action in
 19 equity provides Plaintiffs a remedy for an alleged violation. *Id.* at 129; *see Clarke v. Securities Indus. Ass'n*,
 20 479 U.S. 388, 396, 400 & n. 16 (1987).

21 Even if Plaintiffs could sue to enforce § 284, DoD's construction of the barrier projects at
 22 issue is squarely within its counterdrug support authority. Plaintiffs' motion does not dispute that the
 23 projects at issue were approved in accordance with § 284's procedural requirements, *id.* § 284(a),
 24 (a)(1)(A), and encompass the type of border infrastructure construction permitted by the statute, *id.*
 25 § 284(b)(7). Plaintiffs' motion likewise does not dispute that the projects at issue are being constructed
 26 in "drug smuggling corridors" along the U.S.-Mexico border. 10 U.S.C. § 284(b)(7). As explained
 27 above, the record includes extensive evidence to support recent drug-smuggling activities between
 28 ports of entry in the El Paso, Yuma, Tucson, and El Centro Sectors, and explains why border-barrier

1 construction is necessary to impede and deny illegal drug activities in these areas. *See supra* at 8.

2 Instead, Plaintiffs raise only issues of statutory interpretation, all of which lack merit. The text
3 and history of § 284 contradict Plaintiffs’ claim that Congress impliedly limited DoD’s authority under
4 the statute. *See* Pls.’ SJ Mot. at 13 (citing the congressional notification requirement for “small scale
5 construction” under \$750,000 provided in § 284(h)(1)(B), (i)(3)). No monetary restrictions appear in
6 the types of support permitted under § 284. *See* 10 U.S.C. § 284(b)-(c). To the contrary, the statute
7 broadly approves certain construction without regard to the size, scale, or budget of the project. *Id.*
8 § 284(b)(7). And since Congress first provided this authority in 1990, DoD has repeatedly used it,
9 with Congress’s explicit approval, to complete large-scale fencing projects along the southern border
10 in support of DHS’s counter-drug activities. *See* H.R. Rep. No. 103-200, at 330-31; H.R. Rep. No.
11 109-452, at 368. In fact, Congress has recommended that DoD spend millions of dollars on specific
12 border projects. *See* H.R. Rep. No. 109-452, at 369; *see also supra* at 6-7. There is simply no reason to
13 infer that Congress intended to limit all “support” authorized under § 284 by the types of
14 congressional notification required in § 284(h). Indeed, inferring some unspecified monetary limit on
15 DoD’s § 284’s authority would be entirely arbitrary, as nothing in the statute even arguably defines
16 any upper limit.

17 There is also nothing inherently “implausible” about Congress choosing to require notice for
18 some, but not all, projects that DoD could construct under § 284. *See* Pls.’ SJ Mot. at 13. Certain
19 types of support authorized under § 284 explicitly refer to—*but are not limited to*—“small scale” or
20 “minor” construction. *See* 10 U.S.C. § 284(b)(4), (c)(1)(B). Accordingly, if Congress wanted to limit
21 all construction authorized by § 284 to “small scale construction,” it “presumably would have done
22 so expressly.” *Russello v. United States*, 464 U.S. 16, 23 (1983). “The short answer is that Congress did
23 not write the statute that way.” *Id.*

24 Plaintiffs also incorrectly claim that DoD’s use of § 284 authority “violate[s] general
25 appropriation laws.” *See* Pls.’ SJ Mot. at 13-15. They rely on the principle that, where two
26 appropriations are available to an agency—one for a “specific purpose” and another that “in general
27 terms . . . might be applicable in the absence of the specific appropriation,” the agency must use the
28 specific appropriation to the exclusion of the general appropriation. *See Nevada v. Dep’t of Energy*, 400

1 F.3d 9, 16 (D.C. Cir. 2005). Plaintiffs cite no authority that the principle extends beyond the
 2 circumstance of a *single* agency determining which of two appropriations *to that agency* should be used
 3 for a particular object or purpose.⁶ That is not the case here. Separate from the \$1.375 billion
 4 appropriation to DHS, DoD is acting under its § 284 authority, using its own appropriated funds
 5 transferred pursuant to § 8005 and § 9002.⁷

6 Congress did not expressly or impliedly limit in either DHS's or DoD's fiscal year 2019
 7 appropriations the use of DoD's authority to provide support to DHS through barrier construction
 8 activities pursuant to § 284. And contrary to Plaintiffs' contention, Congress's decision not to
 9 appropriate to DHS the full amount of funds requested by the President for fiscal year 2019 border-
 10 barrier construction does not "bar" the Acting Secretary from utilizing his § 284 authority for such
 11 construction. *See* Pls.' SJ Mot. at 14. "An agency's discretion to spend appropriated funds is cabined
 12 only by the text of the appropriation." *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 200 (2012).
 13 Plaintiffs have identified no restriction in the CAA on the funding of border-barrier construction
 14 pursuant to other statutory authorities, nor does its plain text include one. *See* Pls.' SJ Mot. at 13-14;
 15 *see generally* Pub. L. No. 116-6 (2019). Congress did not modify any of the statutes at issue here in the
 16 CAA. *See id.* And the CAA's funding provisions do not otherwise alter the meaning or availability of
 17 permanent statutes already in effect. *See Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267, 1276 n.5
 18 (9th Cir. 2015), *overruled on other grounds by* 136 S. Ct. 2117 (2016); *Olive v. Comm'r of Internal Revenue*, 792
 19 F.3d 1146, 1150 (9th Cir. 2015). In the absence of language to the contrary, the grant of a specific,
 20 one-year appropriation to DHS in the CAA cannot be read to restrict DoD's permanent statutory
 21 authority under § 284.

22 Indeed, the purpose of § 284 is to permit DoD to use its own appropriated funds to support
 23

24 ⁶ Indeed, the authority Plaintiffs cite involves that very scenario. *See Nevada*, 400 F.3d at 16;
 25 *Highland Falls-Fort Montgomery Central Sch. Dist. v. United States*, 48 F.3d 1166, 1171 (Fed. Cir. 1995).

26 ⁷ For the same reason, DHS and DoD have not violated the Purpose Statute. *See* 31 U.S.C. §
 27 1301. Both agencies are applying their appropriations "only to the objects for which the appropriations
 28 were made." *Id.* § 1301(a). And, as explained above, because DoD is using its transfer authority
 conferred in § 8005 and § 9002, it likewise does not violate the Transfer Statute. *See* 31 U.S.C. § 1532
 (prohibiting transfer of funds from one appropriation account to another unless "authorized by law.").

1 DHS through, among other things, construction of barriers to block drug-smuggling corridors. *See*
 2 *supra* at 6-7. If the Court were to accept Plaintiffs' argument, DoD would be prohibited from
 3 providing such authorized support under § 284 in any year in which Congress appropriates funds to
 4 DHS specifically for border fence construction. Inferring such a restriction—without Congress's
 5 express intention and contrary to the purpose of § 284—would be tantamount to a repeal by
 6 implication, a disfavored rule that “applies with special force when the provision advanced as the
 7 repealing measure was enacted in an appropriations bill.” *United States v. Will*, 449 U.S. 200, 221-22
 8 (1980).

9 Finally, Plaintiffs claim incorrectly that the Acting Secretary of Defense's actions are
 10 nonetheless prohibited by § 739 of the Financial Services and General Government Appropriations
 11 Act, 2019 (a component of the CAA). That provision states:

12 None of the funds made available in this or any other appropriations Act may
 13 be used to increase, eliminate, or reduce funding for a program, project, or
 14 activity as proposed in the President's budget request for a fiscal year until such
 15 proposed change is subsequently enacted in an appropriation Act, or *unless such*
change is made pursuant to the reprogramming or transfer provisions of this or any other
appropriations Act.

16 Pub. L. No. 116-6, div. D, § 739 (emphasis added). Plaintiffs claim that, because the President has
 17 requested border-barrier funding for fiscal year 2020, no funds in excess of the \$1.375 billion
 18 specifically appropriated to DHS for border-barrier construction may be used for that purpose. *See*
 19 Pls.' SJ Mot. at 14. Plaintiffs misapprehend the situation. The funds utilized for border-barrier
 20 construction pursuant to § 284 will be used for the purpose for which they were appropriated, not to
 21 increase funding for an item in the President's 2020 budget request. Thus, the use of funds at issue
 22 here complies with the requirements of § 739.

23 **III. DoD's Use of Its Transfer and Counterdrug Support Authority Does Not** 24 **Violate the Constitution.**

25 DoD's use of its statutory authority to fund and construct the projects at issue is not
 26 unconstitutional. Plaintiffs' claims to the contrary merely recast their statutory claims in constitutional
 27 terms, and “claims simply alleging that the President has exceeded his statutory authority are not
 28 ‘constitutional’ claims.” *Dalton*, 511 U.S. at 473. As Plaintiffs acknowledge, *See* Pls.' SJ Mot. at 16, the

1 outcome of their claims turns on what the transfer and counterdrug support statutes mean—a purely
 2 statutory dispute with no constitutional dimension.

3 The Supreme Court’s decision in *Dalton* makes this clear. In *Dalton*, the Court specifically
 4 rejected the proposition that “whenever the President acts in excess of his statutory authority, he also
 5 violates the constitutional separation-of-powers doctrine.” *Id.* at 471. The Court instead recognized
 6 that the “distinction between claims that an official exceeded his statutory authority, on the one hand,
 7 and claims that he acted in violation of the Constitution, on the other, is too well established to permit
 8 this sort of evisceration.” *Id.* at 474.

9 By asserting that DoD acted unconstitutionally by violating § 284, Plaintiffs make precisely
 10 the argument that the Court disapproved in *Dalton*. Plaintiffs assert no constitutional violation
 11 separate from the alleged statutory violations. Instead, Plaintiffs assert that Defendants’ use of
 12 statutory authorities violated the appropriations to DHS in the CAA. Plaintiffs’ Appropriations Clause
 13 claim hinges on the allegation that Defendants acted “in violation of the restrictions imposed in the
 14 CAA.” *See* Pls.’ SJ Mot. at 16. Plaintiffs’ separation-of-powers claim likewise turns on the allegation
 15 that Defendants acted contrary to the will of Congress because they allegedly took actions outside the
 16 CAA’s restrictions. *See id.* at 17. And Plaintiffs’ Presentment Clause claim amounts to an assertion
 17 that, by directing the funding of border barrier construction pursuant to statutory authorities that
 18 Plaintiffs allege do not apply, the President “disregard[ed]” the CAA. *Id.* These allegations of ultra
 19 vires statutory actions do not state independent constitutional claims.⁸ *See Dalton*, 511 U.S. at 473-74.

20 Plaintiffs’ separation-of-powers claim also fails because the President has not purported to
 21 exercise his inherent authority under Article II of the Constitution. Contrary to Plaintiffs’ contentions,
 22 *see id.*, this case presents a sharp contrast to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952),
 23 in which the President directed the Secretary of Commerce to seize the nation’s steel mills relying
 24 solely upon “the aggregate of his powers under the Constitution,” and conceding the absence of
 25

26 ⁸ This is so even if the Court believes that Defendants’ interpretation of its statutory authority
 27 “would pose serious [constitutional] problems.” PI Order at 36. Although Defendants respectfully
 28 disagree, the resulting ruling would likely be that Defendants’ actions were not statutorily authorized,
 not that they were unconstitutional. *Id.* at 36-37.

1 statutory authority. *Id.* at 585-87. The situation here is entirely different, for the actions at issue are
 2 all “pursuant to an express . . . authorization of Congress,” such that the agencies’ “authority is at its
 3 maximum.” *Id.* at 635 (Jackson, J. concurring). For that reason, Plaintiffs’ reliance on *City and County*
 4 *of San Francisco v. Trump*, 897 F.3d 1225 (2018), is misplaced because the decision there hinged on the
 5 absence of congressional authorization. *See id.* at 1234-35.

6 The fact that Congress authorized one-year funding for certain border-barrier construction in
 7 the CAA does not mean that it prohibited the use of other available statutory sources to provide
 8 additional funding for such construction. Had Congress wished to prohibit the use of those
 9 permanent authorities, it could have explicitly stated so. *See United States v. McIntosh*, 833 F.3d 1163,
 10 1179 (9th Cir. 2016). Because Congress has statutorily authorized the conduct at issue, there can be
 11 no concerns that Defendants are usurping “Congress’s constitutionally-mandated power” to assess
 12 and determine “permissible spending.” PI Order at 38. DoD is acting pursuant to authority granted
 13 by Congress, and *Youngstown* is thus inapposite. *See Am. Fed’n of Labor & Congress of Industrial Orgs. v.*
 14 *Kahn*, 618 F.2d 784, 787 (D.C. Cir. 1979) (en banc); *see also Dalton*, 511 U.S. at 473.

15 Plaintiffs’ Appropriations Clause claim also fails because all actions by the President and DoD
 16 alleged here are statutorily authorized. As such, this case is distinguishable from *United States v.*
 17 *McIntosh*. The court in *McIntosh* held that, where the Department of Justice spent funds in a manner
 18 expressly prohibited by the text of an appropriations bill, and without any other source of
 19 congressional authorization, such expenditures could violate the Appropriations Clause. *See* 833 F.3d
 20 at 1175. In contrast, here, the § 284 projects at issue will be funded under statutes authorizing such
 21 action. Nothing in the CAA prohibit the expenditure of funds pursuant to these statutes. Accordingly,
 22 unlike in *McIntosh*, DoD has not expended funds without the authorization of Congress, and Plaintiffs’
 23 claims amount to allegations of statutory—not constitutional—violations.

24 Finally, Plaintiffs have not alleged an actual Presentment Clause violation. Plaintiffs cannot
 25 dispute that the President signed the CAA into law according to the constitutionally mandated
 26 procedure. *See* U.S. Const., art. 1, § 7. And their claim that the President has disregarded that law is
 27 baseless. This case is in no way comparable to *Clinton v. City of New York*, 524 U.S. 417 (1998), wherein
 28 the Supreme Court held that the President’s action explicitly “cancell[ing] in whole” portions of

1 enacted statutes violated the Constitution. *Id.* at 436; *see also id.* at 439. The CAA remains in effect,
 2 and DoD has acted pursuant to other statutory authority to fund border-barrier construction. Such
 3 use of these statutory authorities does not render the CAA moot.

4 **IV. The Acting Secretary of Homeland Security Has Waived NEPA's Application**
 5 **Pursuant to IIRIRA.**

6 Plaintiffs' NEPA claim fails because the Acting Secretary of Homeland Security has waived
 7 NEPA's requirements for the border barrier projects at issue here. The Court rejected Plaintiffs'
 8 NEPA argument in its preliminary injunction opinion, *see* PI Order at 46-48, and Plaintiffs do not
 9 present any new arguments that would warrant a different conclusion on the merits. *Compare* Pls.'
 10 Mot. at 17-18 *with* Pls.' Reply In Support of Mot. For Prelim. Inj. at 18-19 (ECF No. 91).

11 IIRIRA authorizes such waivers in conjunction with the statutory directive that the Secretary
 12 of Homeland Security "take such actions as may be necessary" to install "physical barriers" on the
 13 "United States border to deter illegal crossings in areas of high illegal entry into the United States."
 14 IIRIRA § 102(a). That statutory mandate includes a directive requiring DHS to "construct reinforced
 15 fencing along not less than 700 miles of the southwest border." *Id.* § 102(b)(1)(A). Congress grew
 16 frustrated by "[c]ontinued delays caused by litigation" preventing border barrier construction and
 17 granted the Secretary of Homeland Security authority to waive any "laws that might impede the
 18 expeditious construction of security infrastructure along the border." *See* H.R. Rep. 109-72, at 171
 19 (May 3, 2005). IIRIRA seeks to ensure expeditious construction pursuant to these mandates by
 20 authorizing the Secretary of Homeland Security to waive a broad array of legal impediments:
 21 "Notwithstanding any other provision of law, the Secretary of Homeland Security shall have the
 22 authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines
 23 necessary to ensure expeditious construction of the barriers and roads under this section." IIRIRA §
 24 102(c)(1).

25 Acting under § 102 of IIRIRA to take "such actions as may be necessary" to install border
 26 barriers, DHS requested that DoD, pursuant its authority under § 284(b)(7), assist DHS by
 27 constructing fences, roads, and lighting for the border barrier projects at issue in this case. *See* AR at
 28 15-16. The Acting Secretary of Homeland Security subsequently exercised his authority under

§ 102(c)(1) of IIRIRA to issue waivers for these projects. *See* Determinations Pursuant to IIRIRA, 84 Fed. Reg. 17185-87 (Apr. 24, 2019); 21798-801 (May 15, 2019). As relevant here, the waived laws include NEPA along with “all federal, state, or other laws, regulations, and legal requirements of, deriving from, or related to the subject of, the [listed] statutes.” *Id.* Under the law of this circuit, the “waiver of the relevant environmental laws under section 102(c) is an affirmative defense to all the environmental claims.” *In re Border Infrastructure Envtl. Lit.*, 915 F.3d 1213, 1221, 1225 (9th Cir. 2019).

Plaintiffs erroneously contend that IIRIRA waivers apply only to actions “under this section—that is, under section 102 of IRRIRA” and the waivers here do not extend to DoD because its authority to construct the projects is derived from § 284. *See* Pls.’ SJ Mot. at 18. But as the Court previously recognized, there is no basis “to find that even though it is undisputed that DHS could waive NEPA’s requirements if it were paying for the projects out of its own budget, that waiver is inoperative when DoD provides support in response to a request from DHS.” *See* PI Order at 48. Further, there is no legal basis “to impose different NEPA requirements on DoD when it acts in support of DHS’s Section 102 authority in response to a direct request under Section 284 than would apply to DHS itself.” *Id.*; *see Defs. of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 121, 129 (D.D.C. 2007) (applying IIRIRA waiver where the Army Corps of Engineers, a DoD component, constructed border fencing “on behalf of DHS” and dismissing NEPA claim against the Bureau of Land Management, a component of the Interior Department, after DHS issued IIRIRA waiver). For these reasons, Plaintiffs’ NEPA claim fails and partial summary judgment should be granted in favor of Defendants.

V. Plaintiffs Have Not Met The Requirements For A Permanent Injunction.

The Court should deny Plaintiffs’ request for a permanent injunction to prohibit the funding and construction of the Yuma, El Paso, El Centro, and Tucson projects.

“[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-58 (2010); *See Winter v. Natural Res.*

1 *Def. Council*, 555 U.S. 7, 32 (2008). Even if Plaintiffs were to prevail on the merits of their claims,
 2 permanent “injunctive relief is not automatic, and there is no rule requiring automatic issuance of a
 3 blanket injunction when a violation is found.” *See N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th
 4 Cir. 2007). As the Supreme Court has emphasized, a permanent “injunction is a matter of equitable
 5 discretion; it does not follow from success on the merits as a matter of course.” *Winter*, 555 U.S. at
 6 32.

7 **A. Plaintiffs Have Not Established an Irreparable Injury.**

8 Plaintiffs argue that the challenged projects will harm their enjoyment of public lands in two
 9 ways. First, they argue that border wall construction will negatively impact their members’ subjective
 10 enjoyment of nearby public lands. *See* Pls.’ SJ Mot. at 21. Second, they argue that significant light
 11 pollution will inevitably accompany border infrastructure, disrupting their members’ ability to stargaze
 12 or observe nocturnal wildlife in the border area. *See id.* at 21-22. These allegations fall short of the
 13 demanding standard for injunctive relief; the border wall will not cut Plaintiffs’ members off from
 14 nearby recreational resources and CBP will utilize mitigation measures to restrict impacts associated
 15 with lighting. For these reasons, Plaintiffs have not shown an irreparable injury sufficient to warrant
 16 a permanent injunction.

17 Plaintiffs must show that their members face a likely—not just possible—threat of irreparable
 18 harm to their interests in the area. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.
 19 2011) (citing *Winter*, 555 U.S. at 22).⁹ In the Ninth Circuit, a plaintiff may attempt to meet this burden
 20 by showing that a challenged federal action will prevent its members from using a public area. *All. for*
 21 *the Wild Rockies*, 632 F.3d at 1135; *but see Gallatin Wildlife Ass’n v. U.S. Forest Serv.*, 2018 WL 1796216,
 22 at *5 (D. Mt. April 16, 2018) (distinguishing *Cottrell* and finding no irreparable harm where challenged
 23 grazing would not prevent use and where area was already disturbed by past grazing); *Ctr. for Biological*
 24 *Diversity v. Hays*, No. 2:15-cv-01627-TLN-CMK, 2015 WL 5916739, at *10 (E.D. Cal. Oct. 8, 2015)

25
 26
 27 ⁹ In *Cottrell*, the Ninth Circuit also held that the “‘serious questions’ version of the sliding
 28 scale test for preliminary injunctions remains viable after the Supreme Court’s decision in *Winter*.”
Cottrell, 632 F.3d at 1134. We preserve that holding for review by the Ninth Circuit en banc or the
 Supreme Court.

1 (rejecting an “aesthetic opinion that post-fire logging is ‘ugly’” as sufficient to establish an irreparable
2 harm).

3 In *Cottrell*, on which Plaintiffs continue to heavily rely, the Ninth Circuit found an irreparable
4 harm where a post-fire salvage project “would prevent the use and enjoyment by [plaintiffs] of 1,652
5 acres of the forest,” which the Ninth Circuit held was “hardly a *de minimis* injury.” *Id.* Here, in contrast,
6 Plaintiffs will still be able to access lands near the southern border. The construction activities for the
7 projects will occupy only a narrow, 60-foot strip of federal land directly adjacent to the international
8 boundary line. *See* First Enriquez Decl. ¶¶ 10-12, 16-18, 63; Second Enriquez Decl. ¶¶ 10-16. That
9 land is already heavily disturbed—by both existing border barriers and roads—and functions primarily
10 as a law enforcement corridor. *See* First Enriquez Decl. ¶¶ 50, 63-64; Second Enriquez Decl. ¶ 67.
11 Border wall construction will not impact land uses in the thousands of acres surrounding the limited
12 project areas, where the forms of recreation Plaintiffs enjoy will remain possible. *See* First Enriquez
13 Decl. ¶¶ 63-64; Second Enriquez Decl. ¶¶ 46, 66-69. For this reason, Plaintiffs have not shown that
14 the border wall will prevent their use of neighboring public lands.

15 Nor have Plaintiffs shown they are likely to suffer irreparable harm from lighting that will be
16 installed along the border. Plaintiffs provide no evidence to suggest that the narrow strip of land
17 immediately adjacent to the proposed barriers is the only location across the entire southern border
18 where they can view the night stars and nocturnal animals. Nor do Plaintiffs cite any authority for the
19 proposition that the inability to stargaze or observe nocturnal animals in a specific area constitutes
20 irreparable injury, particularly where, as here, there are thousands of acres of nearby land available for
21 those very activities. In any event, CBP will take steps to minimize light spillage beyond the immediate
22 vicinity of the narrow project areas, including through the installation of light shields. *See* Second
23 Enriquez Decl. ¶¶ 60-61. And, because the land is already heavily disturbed—and is thus unlikely to
24 be used as animal habitat—new lighting is not likely to have a significant impact on nocturnal animal
25 species or Plaintiffs’ members’ ability to enjoy those species. *See id.* ¶ 61. Accordingly, Plaintiffs have
26 not shown that lighting on the border will cause irreparable harm to their members’ recreational
27 interests in neighboring lands.

B. The Balance of Equities and Public Interest Strongly Weigh Against Injunctive Relief.

A permanent injunction prohibiting construction of the border barrier projects will cause serious harm to the Government and public interest that significantly outweighs the alleged recreational and aesthetics interests asserted by the Plaintiffs. *See Winter*, 555 U.S. at 23-24.

The Supreme Court has recognized that the Government has “compelling interests in safety and in the integrity of our borders,” *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672 (1989), but a permanent injunction would prohibit the Government from taking critical steps needed to prevent the continuing surge of illegal drugs from entering the country through the southern border. As the President recently explained in declaring the national emergency, tens of thousands of pounds of illegal drugs are smuggled across the southern border each year and the border is a “major entry point” for “illegal narcotics.” *See* Proclamation; Veto Message. As discussed above, DHS identified the barrier projects at issue because of the high rates of drug smuggling between ports of entry in the Yuma, El Paso, El Centro, and Tucson Sectors. *See supra* at 8. Indeed, the record establishes that thousands of pounds of illegal drugs are entering the country between ports of entry in these sectors, and explains that existing barriers in these areas have proved ineffective as transnational drug organizations have changed their tactics. *See id.*; *see also* McAleenan Testimony at 2 (drug cartels are using large caravans as diversions to redirect border patrol agents). A permanent injunction would harm the Government’s “strong interest[]” in “interdicting the flow of drugs” entering the United States. *United States v. Guzman-Padilla*, 573 F.3d 865, 889 (9th Cir. 2009).

Moreover, the injunction would permanently deprive DoD of its authorization to use the funds at issue to complete the projects, because the funding will lapse at the end of the fiscal year. In addition to prohibiting any actual spending on these projects, a permanent injunction would forbid DoD from obligating approximately \$1.1 billion it has transferred for these projects but has not yet obligated via construction contracts. *See* First Declaration of Eric McFadden ¶ 6 (Ex. 12) (May 29, 2019); Second Declaration of Eric McFadden ¶ 6 (Ex. 13) (June 18, 2019). Unless those funds are obligated by September 30, 2019, this money will no longer remain available to DoD. *See* First McFadden Decl. ¶ 7; Second McFadden Decl. ¶ 7; *see also City of Houston v. Department of Hous.*

1 *Urban Dev.*, 24 F.3d 1421, 1424, 1426-27 (D.C. Cir. 1994) (recognizing the “well-settled matter of
 2 constitutional law that when an appropriation has lapsed . . . federal courts cannot order the
 3 expenditure of funds that were covered by that appropriation”). This harm is particularly acute
 4 because the complex and time-consuming process required to obligate the remaining money requires
 5 DoD to take multiple steps before the September 30 deadline. *See* First McFadden Decl. ¶¶ 8-10;
 6 Second McFadden Decl. ¶¶ 8-10. By contrast, Plaintiffs identify no irreparable injury from the mere
 7 obligation of funds, which simply creates a legal liability for the Government to pay for goods or
 8 services that would be provided or performed by the contractors. *See Lublin Corp. v. United States*, 84
 9 Fed. Cl. 678, 685 (2008).

10 In addition, a permanent injunction would force DoD to incur unrecoverable fees and
 11 penalties of hundreds of thousands of dollars to its contractors for each day that construction is
 12 suspended. *See* First McFadden Decl. ¶¶ 11-19; Second McFadden Decl. ¶¶ 11-19. That money
 13 cannot be spent for productive purposes, and will result in significant costs for the Government. *See*
 14 First McFadden Decl. ¶¶ 14-15 (estimating costs of \$195,000 per day for El Paso Project 1 and \$20,000
 15 per day Yuma Project 1); Second McFadden Decl. ¶¶ 14-15 (estimating costs of \$235,180 per day for
 16 the Tucson projects and \$47,000 per day for the El Centro project). These costs will quickly become
 17 unsustainable for the Government, and if the contracts remain suspended for too long, DoD will be
 18 forced to de-scope or terminate the contracts. *See* First McFadden Decl. ¶ 19; Second McFadden
 19 Decl. ¶ 19.

20 As was the case in *Winter*, the lopsided equitable balance of harms in favor of the Government
 21 supports denial of a permanent injunction in this case. *See* 555 U.S. at 23-31.

22 **VI. The Court Should Deny Plaintiffs’ Request For Overbroad Injunctive and**
 23 **Declaratory Relief, Stay Any Injunction Pending Appeal, and Certify its Final**
 24 **Judgment for Appeal Pursuant to Rule 54(b).**

25 In the event the Court grants Plaintiffs’ request for injunctive and declaratory relief, that relief
 26 should be tailored solely to the six specific border projects presently before the Court. *See*
 27 *California v. Azar*, 911 F.3d 558, 584 (9th Cir. 2018). Plaintiffs argue for much broader relief and
 28 request that the Court “declare unlawful the use of any DoD authority to transfer funds for

1 construction of border barriers” for “all sections of the border.” *See* Pls.’ SJ Mot. at 23-24. But there
 2 is no basis for the Court to issue the equivalent of nationwide declaratory or injunctive relief in order
 3 to provide complete relief to the Plaintiffs. *See Azar*, 911 F.3d at 582-83. The Court should not enjoin
 4 or declare unlawful other projects in other locations that are not before it.

5 Further, if the Court grants Plaintiffs’ requested injunction, the Court should stay the order
 6 pending appeal. For the reasons explained above, Defendants have, at a minimum, satisfied the
 7 requirements for a stay of any injunction pending appeal. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

8 In addition, the Court should certify its final judgment pursuant to Rule 54(b): “the court may
 9 direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court
 10 expressly determines that there is no just reason for delay.” Here, there is no reason to delay entry of
 11 final judgment with respect to the claims related to the funding and construction of the six projects
 12 pursuant to § 8005, § 9002, and § 284. The legal and factual issues do not “intersect and overlap” with
 13 the outstanding claims in this case, which focus on separate statutory authorities, and final judgment
 14 on these claims will not result in piecemeal appeals on the same sets of facts. *Jewel v. Nat’l Sec. Agency*,
 15 810 F.3d 622, 629-30 (9th Cir. 2015).

16 CONCLUSION

17 For the foregoing reasons, the Court should deny Plaintiffs’ motion for partial summary
 18 judgment, grant Defendants’ motion for partial summary judgment, and enter final judgment for
 19 Defendants on all claims related to the funding and construction of the border barrier projects
 20 identified as El Paso Sector Project 1, Yuma Sector Project 1, El Centro Sector Project 1, and Tucson
 21 Sector Projects 1, 2, and 3. A proposed order is attached.

1 DATE: June 19, 2019

Respectfully submitted,

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